IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.33 OF 2005

IN

SUIT NO.74 OF 2005

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Dolphin Offshore Enterprises
(India) Ltd. ...Plaintiffs

v/s.

Oil and Natural Gas Corporation
Ltd. & Anr. ...Defendants

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Mr.V.K. Rambhadran for the Plaintiffs.

Mr.S.A.Bhalwal i/b Vyas & Bhalwal for the Defendants.

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CORAM: D.K.DESHMUKH, J.

DATED: 20TH JANUARY, 2006

P.C.:

1. This Notice of Motion is taken out by the Plaintiff. In the suit, the Plaintiff claims a decree of declaration that there is no concluded contract between the Plaintiff and the first Defendant in regard to submission of their offer against the tender dated 14-12-2004 and that the Plaintiff has validly withdrawn the offer. The Plaintiff also claims for a perpetual injunction restraining the Defendant/ONGC from invoking the bank guarantee.

2. By this Notice of Motion, the Plaintiff claims for a temporary injunction restraining the ONGC from invoking the bank guarantee and also a temporary injunction against the bank from making payment of the amount of bank guarantee to the ONGC.

3. The facts that are material and relevant for deciding this Notice of Motion are, Defendant No.1 published invitation to bid dated 14-12-2004 inviting sealed tenders for certain work. The tenders were

submitted in the prescribed forms as per the instructions to bidder which were contained in Forms at Appendix-1 to Appendix-12 and also General Conditions of Contract. The bids were to be submitted by 27-12-2004. In Appendix-2A in the instructions to the bidder, it was stated that the person who submits the bid would keep that bid open for a period of 120 days from the last date of submission of the bid. Clause 4 of Section I which has the heading "instruction" defines the terms valid period of offer in following terms.

> 4.0 VALIDITY PERIOD OF OFFER 4.1 The offer shall be valid for acceptance for a period of 120 days, as indicated in the "Invitation to Bid" hereinafter referred to as validity period and shall not be withdrawn on or after the opening of tenders till the expiry of the validity period or any extension thereof.

4. Thus clause 4(1) lays down that the offer should be kept valid for acceptance for a period of 120 days as indicated in the invitation to bid and that

is to be referred as validity period. It further lays down that it shall not be withdrawn on or before the opening of the tenders till the expiry of the validity period or till any extension thereof. It is thus clear that according to clause 4.1, the offer is to be kept open for a period of 120 days as indicated in the invitation to bid. Invitation to bid contains Appendix-2A, which in clear terms lays down that the offer has to be kept open for a period of 120 days from the date of submission of offer. Clause 4.1 further provides that after the offer is opened, it has to be kept open during the validity period. Clause 9.4 of Section I lays down that if the offer is withdrawn during the validity period, the earnest money deposited can be forfeited. The Plaintiff has admittedly withdrawn his bid before it was opened. Appendix-4A to the invitation to bid provides that validity of bid is 120 days from the opening of the unprice bid. The case of the Plaintiff is that as the validity period of the bid starts from opening of the bid, the amount of earnest money can be forfeited only if the offer is withdrawn after it is opened. Earnest money, according to the Plaintiff, cannot be forfeited, if the offer is withdrawn before it is opened, because

that withdrawal is not within the validity period. Perusal of Appendix-2A, which is admittedly signed by the Plaintiff, however, indicates that the Plaintiff had undertaken not to withdraw his offer for a period of 120 days from the date of submission of the offer. Perusal of the bank guarantee shows that the bank guarantee is unconditional and irrevocable Bank Guarantee and it is for the due performance of tenderer’s obligation as contained in the terms of the Notice inviting Tender and other terms and conditions contained in the Tender documents supplied by ONGC which amount is liable to be forfeited on the happening of any contingencies mentioned in the said documents. It is , thus, clear that the bank guarantee can be encashed by ONGC if the Plaintiff fails to perform any condition to which he has agreed as per the tender document. Perusal of Appendix-2A shows that the Plaintiff had agreed to keep his offer open for a period of 120 days from the submission of the tender and the Plaintiff had also agreed to this, if the tenderer fails to honour the above terms and conditions, the Corporation shall have unqualified, absolute and unfettered right to encash the bank guarantee for bid bond submitted in this behalf.

5. Thus, in the tender document the Plaintiff had agreed that in case he resciles from his promise of keeping the offer open for a period 120 days from the date of submission, then the bank guarantee can be invoked, and therefore, in terms of the contract of bank guarantee which as per the settled law is to be taken as the only relevant contract for the purpose of invocation of the bank guarantee, the bank guarantee was liable to be invoked if the Plaintiff does not perform his obligation contained in the notice inviting tenders. The Plaintiff had undertaking an obligation by signing Appendix 2A to keep his offer open for a period of 120 days from submission and had also agreed that in case he withdraws his offer within that period, the ONGC can invoke the bank guarantee. The invocation of the bank guarantee, therefore, by the ONGC is perfectly within the provisions of Appendix -2A and the contract of bank guarantee.

6. In this view of the matter, therefore, in my opinion, the Plaintiff does not have a prima facie case. It is further to be seen here that if the bank guarantee is invoked it will result in ONGC

receiving the amount from the bank, and if the Plaintiff ultimately succeeds he will be entitled to get money decree against the Defendants. If the Plaintiff succeeds in getting the money decree, it cannot be said that the Plaintiff will not be able to execute that decree against the ONGC. In this view of the matter, if the order of temporary injunction is declined to the Plaintiff, the Plaintiff is not likely to suffer any irreparable injury. In my opinion, as the Plaintiff is not likely to suffer any irreparable injury because of refusal of temporary injunction in his favour, an order of temporary injunction cannot be granted in favour of the Plaintiff. For all these reasons, the Notice of Motion is disposed of. Ad-interim order is vacated.

At this stage a request is made for continuation of the ad-interim order. As I find that if the amount of bank guarantee is recovered by ONGC, the Plaintiff is not likely to suffer any irreparable injury, the request cannot be granted. It is rejected.

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